IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1427

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Petitioners,

—v.—

CARL BEAZER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

ALPHONSE E. D'AMBROSE
Attorney for Petitioners
New York City Transit
Authority, et al.
370 Jay Street
Brooklyn, New York 11201

HELEN R. CASSIDY
JOAN OFFNER
EUGENE FREIDUS
of Counsel

INDEX

CITATIONS

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1427

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

*Petitioners,**

—v.—

CARL BEAZER, *et al.*,

*Respondents.***

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the United States Court of Appeals, Second Circuit, of June 22, 1977 is reported at 558 F.2d 97,

* Petitioners, who were defendants in the District Court, appellants-cross-appellees in the appeal to the Circuit Court are the New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, William J. Ronan, individually and in his capacity as a member and as chairman and chief executive officer of the New York City Transit Authority and also as a director and as chairman and chief executive officer of the Manhattan and Bronx Surface Transit Operating Authority, and his successors in office, William L. Butcher, Lawrence R. Bailey, Harold L. Fisher, William A. Shea, Eben W. Pyne, Leonard Braun, "Justine" N. Feldman, Donald H. Elliott, Frederic B. Powers and Mortimer Gleeson, individually and in their capacities as members of the New York City Transit Authority and directors of the Manhattan and Bronx Surface Transit Operating Au-

and reprinted as Appendix A of the petition for Writ of Certiorari (p. 1a). The opinion of the United States Court of Appeals, Second Circuit, entered on February 1, 1978, denying petitioners' petition for rehearing is unreported and appears as Appendix B of the petition for Writ of Certiorari (p. 9a). The opinion of the United States District Court for the Southern District of New York dated August 6, 1975, is reported at 399 F. Supp. 1032 and reprinted as Appendix C of the petition for Writ of Certiorari (p. 11a). The Supplemental Opinion of the United States District Court for the Southern District of New York dated May 5, 1975, is reported at 414 F. Supp. 277 and reprinted as Appendix D of the petition for Writ of Certiorari.

---

thority, and their successors in office; Wilbur B. McLaren, individually and in his capacity as executive officer for labor relations and personnel of the New York City Transit Authority, and his successors in office; Louis Lanzetta, individually and in his capacity as medical director of the New York City Transit Authority, and his successors in office. The Civil Service Commission of New York; Personnel Department of the City of New York; Harry I. Bronstein, individually and in his capacity as a member and as Chairman of the Civil Service Commission of the City of New York, and director of the Personnel Department of the City of New York, and his successors in office; David Stadtmauer and James W. Smith, individually and in their capacities as members of the Civil Service Commission of New York, and their successors in office, were dismissed from the action after the District Court judgment.

** Respondents, who were plaintiffs in the District Court, respondents-cross-appellants in the appeal to the Circuit Court are Carl Beazer; Jose R. Reyes; Francisco Diaz; Malcolm K. Frasier, individually and on behalf of all others similarly situated. Nathaniel Wright was added as a named plaintiff-appellee-cross-appellant member of the class after the District Court trial had begun.

Jurisdiction

The judgment of the United States Court of Appeals, Second Circuit, was entered on June 22, 1977, Appendix A of the petition for Writ of Certiorari (p. 1a). A motion and petition for a rehearing en banc was denied by the United States Court of Appeals, Second Circuit, on February 1, 1978, Appendix B of the petition for Writ of Certiorari (p. 9a). An order granting petitioners' motion for stay of mandate was entered on March 10, 1978.

The petition for Writ of Certiorari was filed April 6, 1978, and granted June 26, 1978. (See Appendix 123A.)* The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment, Section 1 of the Constitution of the United States; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; the Civil Rights Act of 1871, 42 U.S.C. § 1983; New York State Public Authorities Law §§ 1200, et seq.; 28 U.S.C. § 1254(1), are set out in Appendices F-G and I-J of the petition for Writ of Certiorari.

Questions Presented

I. Is the petitioners' denial of empioyment to former heroin addicts participating in methadone maintenance programs, an unconstitutional denial of due process and equal protection under the Fourteenth Amendment?

---

* Hereinafter, references to Supreme Court Appendix will be designated as "A. p. ___."

II. Is the petitioners' denial of employment to former heroin addicts participating in methadone maintenance programs, an unlawful racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.?

Statement of Facts

The Class

As defined by the District Court, the class represented by the named respondents (the plaintiffs below), consists of all those persons who have been or would in the future be subject to dismissal or rejection as to employment by the petitioners on the ground of present or past participation in methadone maintenance programs. (399 F. Supp. at p. 1035).

The Petitioners

The petitioners, the New York City Transit Authority and its subsidiary, the Manhattan and Bronx Surface Transit Operating Authority (hereinafter collectively referred to as the Transit Authority), are public benefit corporations organized under the laws of the State of New York to operate and maintain all subway and bus transportation facilities owned by the City of New York. (N.Y. Public Authorities Law, §§ 1201.1, 1203)

The Transit Authority employs approximately 27,000 persons, including hourly paid and supervisory employees, in the operation and maintenance of the subway system, and about 14,000 employees in the bus operations. In addition, there are about 3500 persons employed in clerical, administrative and professional titles, and 3600 employed as transit police officers. The Authority hires approxi-

mately 3000 employees annually. (R. Tr. 12/12/74, pp. 24-30, 52, 61)*

The subway and bus system operated by the Transit Authority carries about six million passengers each business day, with a total of about two billion passengers a year. (R. Tr. 12/12/74, pp. 25, 61)

The Transit Authority's Policy Regarding Methadone

It is the policy of the Transit Authority to exclude from employment persons who use narcotic drugs, including former heroin addicts who are in methadone maintenance programs. At the same time, the Authority will give individual consideration to people with a past history of drug addiction including those who have completed either a drug free or a methadone maintenance program, and who have been completely drug free and have had a stable history for at least five years. (R. Tr. 1/28/75, pp. 709, 714, 715)

Rule 11(b) of the Transit Authority's Rules and Regulations provides:

> "(b) Employees must not use, or have in their possession, narcotics, tranquilizers, drugs of the Amphetamine group or barbiturate derivatives or paraphernalia used to administer narcotics or barbiturate derivatives, except with the written permission of the Medical Director-Chief Surgeon of the System." (Pl. Ex. 58, appearing in Circuit Court Appendix at p. 2799)

The Transit Authority's Executive Officer for Labor Relations and Personnel, Wilbur B. McLaren, testified that in 1969, as a result of a newly negotiated early retirement plan, a large number of the Authority's experienced opera-

---

* References are to the Trial Transcript. Since the volumes of the Trial Transcript are not paginated consecutively, references are to dates and page numbers of the various volumes.

tions and maintenance employees retired. The accelerated hiring and training of large numbers of new employees created a number of operational problems, including a series of accidents, collisions and fires. (R. Tr. 10/25/74, p. 492)

In an effort to deal with these problems, the Transit Authority undertook a reevaluation of its job standards, including its physical and medical standards. During the course of this reevaluation, the Authority became aware, for the first time, of drug use by a significant number of employees and applicants for employment. (R. Tr. 10/25/74, pp. 495-499)

The Transit Authority began to use urinalysis as a method of detecting drug use in applicants for employment and in the periodic examinations of employees in critical titles. (Employees in critical titles are required to undergo physical examinations on an annual or biennial basis, depending on the employee's age.) From January 1971 to October 1974, the date of McLaren's testimony, the Authority identified over 600 employees and applicants as drug users. (R. Tr. 10/25/74, pp. 497-501)

A series of seminars and conferences was initiated by the Transit Authority to educate key personnel to the problems connected with drug use, and to try to resolve the question of whether the Authority could employ drug users. In addition, McLaren and his staff visited seven or eight drug clinics in the City and discussed with some of the leading experts in the field the possibility of hiring participants in methadone maintenance programs. (R. Tr. 10/25/74, pp. 501, 502, 508, 510, 534)

Through these investigations and consultations, the Transit Authority learned that the rate of return to drug and alcohol abuse among methadone patients was very

high, while the rate of entry into a stable way of life was very low, that patients on methadone maintenance programs required extensive psychological reorientation as part of the treatment program, that the methadone clinics regarded their medical records as confidential and did not make material information concerning their patients available to employers, that the clinics themselves were not adequately regulated, and that many of the clinics were unreliable both in terms of the quality of the services provided to the patients and the information provided to employers. (R. Tr. 10/25/74, pp. 535-544)

The Transit Authority also took into consideration the scope and complexity of the transit system and the deployment of personnel throughout the system, the concern for the safety of passenger services and for maintaining public confidence in the transit system. (R. Tr. 10/25/74, pp. 552-554)

The Transit Authority discounted private industry's limited experience with employment of methadone patients as irrelevant because, as a public employer, the Authority must hire through the civil service system and cannot engage in the small, selective pilot programs adopted by some private companies. In addition, it is fairly simple for a private company to terminate an employee who proves unsatisfactory, whereas in public employment, once the employee has completed a brief probationary period, he cannot be terminated without a formal disciplinary hearing. (R. Tr. 10/25/74, pp. 536-537)

In light of all of the foregoing considerations, the Transit Authority concluded that it would be unwise to exempt methadone maintained patients from the prohibition against the employment of drug users.

The Nature of Methadone Treatment

Methadone treatment is appropriate only for people addicted to heroin. It is a treatment specifically for chronic heroin addicts, i.e., people who have illegally injected heroin into the bloodstream several times a day for at least two years. (R. Tr. 10/22/74, pp. 13, 58)

Methadone is an opiate drug which produces addictive effects in every way similar to the effects of heroin. (R. Tr. 10/22/74, pp. 62-64) If injected into the bloodstream with a needle, or taken orally in large doses, it will produce essentially the same effects as heroin. (R. Tr. 1/7/75, p. 41; 1/28/75, pp. 633-637). When controlled doses of methadone are taken by mouth, the drug is absorbed into the bloodstream over a period of time, rather than sent rapidly into the bloodstream as is the case when a drug is injected. As a result, the concentration of methadone in the blood remains at a stable level for about twenty-four hours, and the individual does not experience the extreme highs and lows associated with heroin use. (R. Tr. 1/7/75, pp. 9-11)

When methadone is ingested in sufficiently high doses, it produces a tolerance or resistance which prevents the methadone user from experiencing any "high" from injecting heroin. (R. Tr. 1/9/75, p. 187) This effect of methadone relates solely to heroin. Methadone has no effect whatever on the use of alcohol, barbiturates, amphetamines or any other types of drugs. (R. Tr. 10/22/74, p. 92)

Methadone is used both in detoxification programs and in methadone maintenance programs. In short-term detoxification programs, the heroin addict is transferred from heroin to methadone, with the doses of methadone gradually reduced to zero over a three week period. Under this procedure, the patient is detoxified from both heroin

and methadone. As indicated in the District Court opinion (399 F. Supp. at p. 1038), this detoxification procedure frequently is unsuccessful, with patients returning to heroin use.

The treatment of heroin addiction by means of maintenance on methadone, rather than by detoxification, was originated by Dr. Vincent Dole during the 1960s. Dole's theory, in essence, was that through the use of carefully controlled doses of methadone, the craving for heroin could be blocked, and that this heroin block, maintained through continued methadone usage, and combined with extensive social and psychological rehabilitative services, could enable the heroin addict to establish a relatively normal life. (R. Tr. 1/7/75, pp. 7-8, 14)

In 1969-1970, methadone maintenance began to be more widely used in the treatment of heroin addicts. (R. Tr. 10/25/74, p. 366) In 1974, at the time this case was tried, there were approximately 40,000 patients in methadone maintenance programs in the City of New York. Of these, approximately 26,000 were treated in public or semi-public programs, and about 14,000 were treated in private programs. The public and semi-public programs are financed almost entirely by federal, state and city grants.

As indicated in the District Court's opinion (399 F. Supp. at p. 1040), the major public and semi-public methadone maintenance programs in New York City are the Beth Israel program, the New York City program, the Bronx State Hospital program, the Addiction Research and Treatment Center (ARTC) program, and the New York State Drug Abuse Control Commission (DACC) program.

Regulations concerning methadone treatment were promulgated by the United States Food and Drug Administra-

tion effective March 1973. (21 CFR § 130 et seq.) Similar regulations were promulgated by the New York State Drug Abuse Control Commission in May 1974. (14 NYCRR Part 2021) Prior to July 1974, the regulation of methadone clinics in New York City was the responsibility of the FDA. Thereafter, DACC took over that responsibility. (R. Tr. 1/28/75, p. 614)

There are essentially two types of methadone maintenance programs—the "high dose" and the "low dose" programs. Detoxification is not one of the goals of the high dose programs. In this type of program, which is espoused by Dole and used in the Beth Israel program, the central goal is to enable the patient to live a relatively normal life, despite the fact that this may require a lifelong dependence on methadone. (R. Tr. 1/7/75, pp. 80, 117, 118; 10/22/74, pp. 19, 20) Sufficiently large doses of methadone (in the range of 80-100 milligrams per dose) are administered to establish an effective resistance to heroin, and no emphasis is placed on future discontinuance of methadone. (R. Tr. 1/7/75, pp. 78, 80; 10/25/74, pp. 379-380) Dole expressed opposition to governmental policies which established detoxification as an obligatory goal. (R. Tr. 1/7/75, p. 78)

In low dose programs, where the dosage is in the range of 40 milligrams per dose, the principal goal is detoxification. Proponents of low dose programs, including Dr. Beny J. Primm and Dr. Irving Lukoff of Addiction Research and Treatment Corp., criticized the high dose programs which place patients on methadone indefinitely, because "our experience with methadone is not that long. The long-term effects are simply still an unknown element. It is still a powerful drug and the less you can give and get away with the better off you are." In addition, they consider that it is easier to detoxify a person from a lower

methadone dosage. (R. Tr. 10/25/74, p. 459; 1/27/75, pp. 481, 482)

Finally, there are the non-methadone, residential drug-free programs such as Phoenix House and Odyssey House which are based on the premise that the problems underlying drug abuse are psychological in nature. Dr. Mitchell S. Rosenthal, the director of Phoenix House, expressed the view that methadone has been "overpromoted" as a method of dealing with the problems of drug abuse. He testified that it is necessary to work with a patient over a long period of time—generally eighteen to twenty-four months—"in order to undo the kinds of emotional problems that have led to drug abuse," and to help the patients "to develop new kinds of inner resources so that they can remain drug-free." (R. Tr. 1/10/75, pp. 409, 428a)

In the high dose and low dose programs, methadone treatment requires the patient to appear at the clinic, take an oral dose of methadone, and participate in a counseling and rehabilitation program. (R. Tr. 10/22/74, p. 15)

The heroin addict who enters a methadone program is given progressively larger doses of methadone until he is brought up to a stabilizing fixed dose on which he is then maintained for an indefinite period of time. This stabilizing process takes about 8-10 weeks. (R. Tr. 1/27/75, p. 547) Patients who are stabilized at a high dose level generally are more resistant to heroin usage than patients stabilized at a low dose level. (R. Tr. 1/9/75, p. 187) Federal regulations require the patient to come to the clinic for dosage a minimum of six days a week for the first three months. As time goes on, if the patient appears to make progress, i.e., adheres to the rules of the clinic and appears to make changes in his way of life, the requirement to appear at the clinic is relaxed to five times a week, then four, then

three. After a minimum of two years on the program, the patient may be permitted to reduce his visits to the clinic to twice a week. Patients who are not required to visit the clinic every day, come in on their scheduled day, drink the day's dose of methadone at the clinic, and take home the doses for the other days. (R. Tr. 1/10/75, pp. 334-336)

In addition to the daily dosage of methadone, patients are expected to participate in counseling sessions. The counseling is necessary because, in Dr. Dole's words, the heroin addict is "a social casualty" and the drug addiction is only a part of the total problem. (R. Tr. 1/7/75, p. 15)

Similarly, Dr. Robert L. DuPont, Jr., Director of the Special Action Office for Drug Abuse Prevention in the Executive Office of the President, testified that the heroin addict typically does not have a job and has a very chaotic personal life. (R. Tr. 10/22/74, pp. 15-16) The District Court opinion noted that "there is substantial agreement that many persons attempting to overcome heroin addiction have psychological or life-style problems which reach beyond what can be cured by the physical taking of doses of methadone." (399 F. Supp. at p. 1039)

With regard to the counseling and rehabilitation program, the clinics do not require the patient to see the counselor a specific number of times a week. In the first eight to ten weeks, the patient may see a counselor every day. Thereafter, he might see a counselor once a week. (R. Tr. 1/27/75, p. 534) While counseling is considered a major aspect of methadone maintenance programs, there was considerable testimony to the effect that little counseling actually occurs. Dr. Rosenberg of Phoenix House and Dr. Judianne Densen-Gerber of Odyssey House testified that while methadone clinics theoretically recognize the need for rehabilitative services, in practice "the majority of

them do very little other than supply the methadone." (R. Tr. 1/10/75, p. 424; 1/28/75, p. 755) Similarly, Dr. James C. Higgins, a consultant to various Veterans Administration hospitals, testified that the methadone patients generally do not avail themselves of the counseling services at the clinics. (R. Tr. 1/10/75, p. 458) Dr. Primm of ARTC confirmed that the extensive rehabilitation and counseling services which the methadone programs profess to give are not actually provided, that on any given day approximately one-third of the patients fail to appear, that some who do come in, stay only for their methadone dosage and do not stay for counseling, and that the monitoring which is supposed to be done by the governmental regulatory agencies is lax. (R. Tr. 1/27/75, pp. 526-528)

The ARTC program has a ratio of forty patients to one counselor. (R. Tr. 1/27/75, pp. 528-530) The Beth Israel program has a ratio of fifty patients to one counselor, with the counselor seeing perhaps three or four patients in a day. (R. Tr. 2/3/75, p. 871) DACC requires a minimum patient-counselor ratio of 50 patients to one counselor. (R. Tr. 1/28/75, p. 691) On the other hand, Dr. DuPont testified that the typical caseload for a counselor should be about twenty patients. He added that there is considerable variation from one clinic to another regarding the specific credentials associated with counseling. (R. Tr. 10/22/74, p. 16)

Results of Methadone Maintenance Treatment

While a number of witnesses at the trial testified to the value of methadone maintenance as a treatment for heroin addiction, at the same time they acknowledged that methadone maintenance had serious limitations and uncertainties and that it failed to achieve its goal for the majority of patients.

Dr. Seymour Joseph, Deputy Commissioner of DACC, testified that about fifty percent of methadone patients "have appeared to do pretty well in a methadone maintenance treatment program" but that the other fifty percent are not suitable subjects for rehabilitation and should not be participating in the program. He testified that there are many individuals for whom methadone is inappropriate, and who, while participating in methadone maintenance programs, continue to steal, to be unproductive, to engage in multiple drug abuse, and to remain alienated from their families. (R. Tr. 1/28/75, pp. 629-630, 645-646, 677-678)

The affidavit of Dr. Daniel Redner, Director of the Jerome Avenue Clinic of the New York City Methadone Maintenance Program, introduced into the record by the respondents,* states that only ten patients out of six hundred in the entire Jerome Avenue Clinic were deemed to have achieved a sufficient level of responsibility and rehabilitation after two years in treatment to qualify for reduction of their mandatory clinic visits to two days a week.

Both Dr. Primm and Dr. Higgins testified to the disruptive behavior of many patients at the methadone clinics, including gathering outside the clinic and exchanging drugs and alcohol with each other. (R. Tr. 1/10/75, pp. 453-456; 1/27/75, pp. 535-537) In addition, Dr. Joseph and Dr. Harold J. Trigg, Chief of the Methadone Maintenance and Drug Addiction Services at Beth Israel Medical Center, testified to the problems connected with the take-home doses given to many patients. Dr. Joseph testified

* Respondents' Redner affidavit is Appendix D to the Memorandum in Support of Plaintiff's Motion to Supplement and Modify the Court's Order of May 20, 1976. The affidavit appears in the Circuit Court Appendix at pp. 404-406.

that if a patient had been evaluated improperly and had not attained a sufficient level of responsibility before being given the privilege of taking home medication, he might get outside the clinic door and drink all the take-home doses at once. (R. Tr. 1/28/75, pp. 637-640) Dr. Trigg testified that there is a "sizable problem" of methadone patients selling their take-home doses on the street. (R. Tr. 1/10/75, pp. 326, 327)

Dr. DuPont testified that for some patients, methadone maintenance is an interim step toward total detoxification. However, many patients require continued methadone use for many years. He said that as long as these stabilized patients remain on methadone, they are able to lead relatively normal lives. However, when they stop taking methadone, they suffer the same withdrawal symptoms as heroin addicts, often experience a deterioration in their lives, and revert to heroin use. (R. Tr. 10/22/74, pp. 19-20, 27)

Dr. Lowinson of Bronx State Hospital testified that the demands of methadone maintenance are "rigorous," since under federal regulations, the patient must continue to report to the clinic at least twice a week for as long as he remains on the program. She stated that "this can prove to be a burden and it drives patients out of treatment." (R. Tr. 2/7/75, p. 1143) Similar observations were made by Dr. Dole. (R. Tr. 1/7/75, pp. 29-30)

Dr. Dole had no information on what percentage of his patients had successfully detoxified and remained drug free for one year, nor did he have any data on the current status of patients who had been in methadone treatment and then left it. (R. Tr. 1/7/75, p. 124)*

* More recently, Dr. Dole published an article in the Journal of the American Medical Association (Vol. 235, No. 19, May 10,

With regard to detoxification, the little data available indicated that the number of people who successfully detoxified from methadone was very small. (R. Tr. 10/22/74, pp. 20-22) In the Bronx State Hospital program, 10% of the methadone patients became drug free. (R. Tr. 2/7/75, pp. 1142-1143) Likewise, in the St. Luke's Hospital methadone program, 10% of the methadone patients were successfully detoxified and the rest had to be placed back on methadone. (R. Tr. 1/9/75, p. 280) Similar results were experienced in the Beth Israel program. (R. Tr. 2/3/75, p. 922) Dr. DuPont testified that past studies had been done which indicated a very high relapse rate to heroin by people who had left methadone programs. (R. Tr. 10/22/74, p. 21)

Alcohol and Drug Abuse

There was general agreement among the expert witnesses at the trial that there was "very substantial" drug and alcohol abuse by patients on methadone maintenance. (R. Tr. 1/10/75, pp. 417-419, 453-454; 1/27/75, p. 508; 1/28/75, p. 677; 2/12/75, pp. 1390-1392)

A well known study by Drs. Chambers and Taylor indicated that 97.4% of methadone patients in treatment at least fourteen months had used illicit drugs sometime in the course of a selected one month period. While Dr. DuPont

---

1976), in which he cited a recent sample study of 204 persons who had left treatment two years earlier. Of the 204, 138 had relapsed to the use of illicit opiates, 32 were seriously alcoholic, 16 were addicted to sedatives or using cocaine, 53 had been arrested, 19 had died, and only 22 could be classified by even a lenient standard as being in satisfactory status. The "lenient standard" referred to in the article did not involve an evaluation of the former patients in terms of their ability to function in society. The article defined "lenient standard" as follows: "[T]hey have no legal problems, and deny use of opiates or other major drugs of abuse and alcoholism."

questioned the accuracy of the Chambers-Taylor report, he himself had found that among methadone patients in treatment an average of eleven months, 42.6% had used illicit drugs, principally amphetamines, at least once in the course of a one month period. DuPont added that a former heroin addict on methadone is more likely to abuse drugs than a person with no history of addiction. (R. Tr. 10/22/74, p. 101) Dr. Rosenthal testified that about 70% of methadone patients abuse other drugs while in methadone programs. (R. Tr. 1/10/75, pp. 417-419)

In this regard, the statistics relied on by the District Court are misleading because they are limited to patients who have been in methadone programs at least six months. (399 F. Supp. at p. 1046) The Court cited the testimony of Dr. Trigg that of the 6500-7000 patients in the Beth Israel methadone program at the end of December 1974, approximately 5000 had been in the program for one year or more, and of that number, about 70-75% were free of illicit drug use. While the District Court apparently regarded these statistics as indicative of the success of the program, they in fact disclose that only about 3500 of the 6500-7000 methadone patients in the Beth Israel program were free of illicit drug use. The District Court used the same approach in evaluating the statistics on drug abuse at the other major clinics. For patients who had been in the City methadone program and the Bronx State Hospital program more than six months, 21% and 23% respectively showed signs of drug and alcohol abuse. The court did not indicate what the percentage of drug abuse was for patients who had been in those programs less than six months. The court similarly cited the ARTC program data to the effect that among patients who had been in treatment a year or more, 60-70% were free of drug or alcohol abuse. There were no statistics as to the rate of alcohol and drug abuse among

the ARTC patients who had been in treatment less than one year.

Thus, the District Court's statistical analysis failed to deal with the total picture of drug and alcohol abuse by methadone patients. In addition, even in the case of those patients who had been in treatment at least six months, and therefore were in the group regarded by the clinics as having the best chance of achieving stability, the statistics cited above show that between 20 and 40% showed signs of alcohol and drug abuse.

Employment

There was considerable testimony as to the serious risks involved in the employment of methadone patients. Drs. Dole and Gollance testified that a patient in the first few months of methadone maintenance is "in a risky situation" and not ready for stable employment. (R. Tr. 1/7/75, pp. 89-90; 1/9/75, p. 155)

Dr. DuPont testified that the employer faces the risks involved in hiring a person who has once "gotten off the track" and who may feel pressure to relapse to heroin and the "lure of the street, the tendency to backslide," including the crime associated with the acquisition of heroin. (R. Tr. 10/22/74, pp. 42, 49) DuPont stated further that it would require a "leap of faith" for an employer to hire a methadone patient who did not have a recent work history. (R. Tr. 10/22/74, p. 41)

With regard to the types of patients enrolled in the clinics, Dr. Lukoff of ARTC testified that about one-third of the patients had become heroin addicts at a very early age—15, 16, 17—and were usually "the most criminal," least educated and least likely to have family ties. About

40-45% of this group dropped out of the methadone programs by the end of the first year. Lukoff stated that the other two-thirds had become addicts at about age 21, and tended to have been in school, to have held jobs, been in the military, married; that this group was more amenable to goals of rehabilitation. (R. Tr. 1/9/75, pp. 266-273) According to Drs. Lukoff and DuPont, approximately one-third of the heroin addicts who enter methadone maintenance programs drop out within the first year. This process was characterized as a "self-cleansing" process. Of the remaining two-thirds of the patients, they considered approximately one-half to two-thirds to be employable. (R. Tr. 10/22/74, p. 121; 1/9/75, pp. 273, 274, 283, 284; 2/12/75, p. 1408)

Dr. Trigg disagreed with Dr. Lukoff's statement that a substantial number of heroin addicts entering methadone programs had stable family relationships and had been able to keep jobs. Trigg testified that 99% of heroin addicts are not able to work, have no desire to work while they are on heroin, and that one of the "cardinal symptoms" of heroin addiction is that a person is not holding down a job. (R. Tr. 1/10/75, pp. 321-323)

Dr. Trigg testified that of the entire methadone patient population in the Beth Israel program, about 33% were employable. (R. Tr. 1/10/75, p. 345) Dr. Joseph of DACC testified that about 50% of the patients in his program would be considered employable. (R. Tr. 1/28/75, pp. 645, 646)

The District Court opinion cited a statistical study conducted by Dr. Frances Gearing of the Columbia School of Public Health which found that 59% of the patients studied were gainfully employed. (399 F. Supp. at p. 1047) However, the court's opinion failed to note that Dr. Gearing's

study was structured in such a way as to reflect only those patients who remained in treatment for a substantial period of time. (R. Tr. 10/30/74, pp. 862-865) The study did not give an accurate picture of the employability of the total methadone clinic population. The validity of Dr. Gearing's reports was questioned by Dr. Lukoff, who observed:

> "I think there are problems connected with the way she handled the data which probably exaggerates success to some extent. . . . It exaggerates, perhaps, the success because you're dealing only with survivors in the program and the survivors in the program are generally your better patients. If you want to understand the full impact of the treatment on the addict population, that's another question altogether and requires a different kind of answer." (R. Tr. 10/25/74, pp. 467, 468)

The other statistics cited by the District Court on the question of employability similarly glossed over the fact that they related to patients who had been participating in methadone programs for a minimum of six months to one year. (R. Tr. 1/27/75, pp. 514, 515; 2/12/75, p. 1408)

In its analysis of the employability of methadone maintained patients, the District Court repeated the type of analysis it had made in connection with alcohol and drug abuse, viz., it relied on statistics which were limited to patients who had been participants in methadone programs for a substantial period of time, and failed to deal with the question of the employability of the total patient population of the methadone clinics.

In addition, even within the group characterized by the clinics as successful methadone patients, the statistics cited above show that from 30-50% were considered by the clinics to be unemployable.

The respondents introduced into evidence recent policy statements of the New York City and New York State Personnel Departments encouraging the employment of drug-free former addicts and methadone patients. (P. Exs. 7 and 11, R. Tr. 10/22/74, pp. 159, 161, appearing in Circuit Court Appendix at pp. 2694 and 2739) No testimony was presented by the respondents with regard to any experience public employers might have had with the employment of methadone patients through the civil service system.

The District Court's recital of the successful employment of methadone patients by various private employers does not withstand examination. The list of such companies cited in the court's opinion (399 F. Supp. at p. 1047) was derived from a mere list of corporate names furnished by representatives of some of the methadone clinics, without any specific supportive data. (R. Tr. 10/25/74, pp. 422, 423)

Eileen Wolkstein, Director of the Vocational Rehabilitation Department at Beth Israel, recited a list of large companies participating in pilot programs of employment of methadone patients. (R. Tr. 10/25/74, pp. 422, 423) However, when asked for specific information concerning the success or failure of those programs, she was able to cite only a study of twenty-six methadone patients hired by private companies. This group of twenty-six had been carefully pre-screened, had to have been on methadone maintenance a minimum of nine months, free of any drug abuse, with a demonstrated ability to work, very recent significant work history, and no outstanding medical problems. (R. Tr. 10/25/74, pp. 428-432) As indicated by Dr. Dole, the patients in the Wolkstein study were a very select minority of methadone patients. (R. Tr. 1/7/75, pp. 105-106) Over the course of fifteen months of employ-

ment, six people in this carefully selected group of twenty-six became the subject of disciplinary proceedings for excessive lateness and absence, and one was fired. (R. Tr. 10/25/74, pp. 430, 447, 448)

The testimony of the various corporate representatives produced at the trial by the respondents made it clear that their experience was limited to small pilot programs involving the employment of carefully selected rehabilitated drug addicts, very few of whom were methadone patients.

Charles D. Ades of Chemical Bank testified that his company had hired thirteen carefully screened former drug addicts, only three of whom were methadone patients. Twenty months later, four had been fired, one for drug abuse and three for poor attendance. The one who was fired for drug abuse was one of the three methadone maintained persons. (R. Tr. 10/24/74, pp. 338, 341, 344-348, 353-354)

The official of the Sheetmetal Workers International Association, cited by the District Court as testifying that the Association was "bringing methadone maintenance patients into its apprenticeship program" (399 F. Supp. at p. 1047), testified that over a three year period, he had hired a total of six persons who were enrolled in a methadone maintenance program for at least six months. (R. Tr. 10/24/74, pp. 335, 337)

Henry D. Biggart of the Off-Track Betting Corporation testified that OTB had undertaken a special program to hire people with a history of drug addiction, and that in the course of this effort, it had hired a total of 39 ex-addicts, 20 of whom were methadone patients, into part-time positions. (R. Tr. 10/29/74, p. 663)

Thomas J. Doyle of Consolidated Edison Company testified that his company had hired about one hundred former drug abusers. He did not indicate how many of that group were drug free and how many were methadone maintained patients, stating only that "few" methadone patients had been discharged from employment. He had specific data only with respect to thirteen "very select" methadone patients who, he testified, were performing well. He stated that applicants were carefully screened, and that "when applicants met our standards of proven stable rehabilitation, their success rate was about 65% over a two year period." (Pl. Ex. 39, R. Tr. 10/25/74, p. 568, appearing in Circuit Court Appendix at pp. 1145-1148)

Paul J. Kolisch of Bernzomatic Corp. testified that he had hired nine drug free former addicts referred by a local rehabilitation center. All were temporarily hired for a period of one to six months as part of a rehabilitation program. None of these individuals was a methadone patient. (R. Tr. 10/29/74, pp. 577-587)

James Peterson of Kennecott Copper Company testified that his company maintained an in-house drug counseling program for employees with drug problems. He did not know how many, if any, persons in the program were methadone patients. (R. Tr. 10/29/74, pp. 590-595)

Determination of Employability

The record in this case does not support the statement of the District Court that the Transit Authority can determine the employability of methadone patients by its usual screening procedures. (399 F. Supp. at p. 1048) On the contrary, the expert witnesses agreed that a methadone patient who applies for employment involves special risks for the employer, and that in order to make a judgment

regarding employability, the employer would need an unusual amount of advice and help. (R. Tr. 1/7/75, p. 97; 1/9/75, p. 155; 1/28/75, pp. 684-685) The expert witnesses were not in agreement as to how the employer would go about obtaining such advice and help.

Drs. Dole and Gollance suggested that the employer consult "a good experienced person in a methadone clinic or a consultant with broad experience in the field of addiction with knowledge of methadone treatment." (R. Tr. 1/7/75, p. 97; 1/9/75, p. 155) The quality of the evaluation obtained of course would depend on the quality of the person making the evaluation. (R. Tr. 1/9/75, pp. 169-170)

Dr. Trigg did not agree that the Transit Authority should refer a methadone patient to a consultant for evaluation, stating "I am not sure that that is sufficient insurance for the TA." He testified further that while the Transit Authority could get information from the clinics, a better procedure "that would perhaps give the TA greater insurance as to what it was getting" would be a certification board that would evaluate both the clinics and the patients. (R. Tr. 1/10/75, p. 347) Such a certification board was created in 1969-1970, but through lack of official governmental support, it ceased to function after a short period of time. (R. Tr. 1/10/75, pp. 445-450) As a possible alternative to a certification board, Trigg suggested that the employer could consult "a panel of experts—primarily physicians." (R. Tr. 2/3/75, p. 852)

Dr. DuPont testified that the clinics could be useful to the employer, but that they "obviously are interested in placing people in employment, so that the employer has to make his own independent judgment." (R. Tr. 10/22/74, pp. 38, 39)

Thus, the options available to the Transit Authority would be to place a heavy reliance on the recommendations of the employees of the methadone clinics, or to hire a panel of medical consultants to evaluate methadone applicants.

The problems of evaluating methadone patients are compounded by federal regulations declaring the records of methadone clinics to be confidential. (42 CFR § 2.1 et seq.) Under these regulations, no information may be given to an employer by the clinic without the consent of the methadone patient. (42 CFR § 2.31) Even where the patient's consent is obtained, the clinic's disclosures to the employer "should be limited to a verification of the patient's status in treatment or a general evaluation of progress in treatment." (42 CFR § 2.38(c)) More specific information may be given only if:

> "The program has reason to believe, on the basis of past experience or other credible information (which may in appropriate cases consist of a written statement by the employer), that such information will be used for the purpose of assisting in the rehabilitation of the patient and not for the purpose of identifying the individual as a patient in order to deny him employment or advancement because of his history of drug or alcohol abuse." (42 CFR § 2.38(d)(1))

By virtue of these confidentiality requirements, all of the experts questioned at the trial testified that the only information the clinics would provide to the employer would be the patient's attendance at the clinic and the counselor's evaluation of the patient's progress. (R. Tr. 10/29/74, p. 663; 1/9/75, pp. 176, 177; 1/28/75, p. 670; 2/3/75, pp. 1060-1061) Dr. DuPont stated that methadone clinics are prohibited from informing the employer of evidence that the patient is using illicit drugs. He added that it would be con-

trary to federal policy regarding confidentiality for an employer to try to make it a condition of employment that the clinic advise the employer of any illicit drug use. (R. Tr. 10/22/74, pp. 104-107, 111, 112)

Consequently, the employer would be hiring the methadone patients on the basis of conclusory statements by clinic personnel without specific supportive data. In addition, after hiring the methadone patient, the employer would not be able to obtain specific data concerning the patient's performance in the methadone treatment program, unless the employer made the written commitment, specified in the federal regulation, that such information would not adversely affect the patient's employment. An employer unwilling to make such a commitment is burdened with the necessity of maintaining an ongoing surveillance of the employee, including frequent urinalyses to detect drug abuse.

The Transit Authority's Policy Regarding Alcohol

The District Court placed considerable emphasis on differences between the Transit Authority's policy regarding the employment of alcoholics and its policy regarding the employment of drug addicts.

The court acknowledged that the Transit Authority refuses to consider for employment any applicant who has an alcohol problem. (399 F. Supp. at p. 1056) Thus, the Authority's policy with regard to applicants for employment who have alcohol problems is identical with its policy with regard to applicants who have drug problems.

The difference noted by the District Court was that "the TA is willing to continue in employment a substantial number of persons with existing alcohol problems." (399 F. Supp. at p. 1056)

With regard to current employees, Rule 11(a) of the Transit Authority's Rules and Regulations prohibits Authority employees from drinking alcoholic beverages during their tours of duty or at any time to an extent making them unfit to report for duty or to be on duty. (Pl. Ex. 58, appearing in Circuit Court Appendix at p. 2798) Rule 11(a) is not limited to alcoholics, but covers individual instances of drinking.

Employees suspected of violation of Rule 11(a) are subjected to disciplinary proceedings which may result in suspension and dismissal. (A pp. 96A-99A) If an employee against whom such charges are sustained at a trial board hearing, has less than three years of service and holds a position in which he is directly engaged in operations, such as Motorman, Conductor or Bus Operator, he will be dismissed. If the employee violating Rule 11(a) holds such an operating position and has more than three years of service, he will be demoted to a non-critical position. If the employee violating Rule 11(a) holds a non-critical position, he is given a hearing and is subject to discipline. (A pp. 96A-99A)

All employees found in violation of Rule 11(a) are referred to the Transit Authority's Employee Counseling Service, an organization in existence within the Authority since 1956, which provides assistance to employees with drinking problems. Employees may also voluntarily seek such assistance. If the Service determines that persons referred to it have alcoholism problems, they are invited to participate in the Service's program which requires consistent attendance at a specified number of Alcoholics Anonymous meetings, together with regular reporting to the Counseling Service. (A pp. 99A-100A)

The Transit Authority's Executive Officer, Wilbur B. McLaren, testified that the alcoholism program had been in effect for many years, that it had been partially successful, but that the Authority had many problems connected with the program. He testified that it was "beyond [the Authority's] capability" to take on a drug problem in addition to the problems presented by the alcoholism program. (R. Tr. 10/25/74, pp. 554-556)

The Decisions Below

The District Court found, under 42 U.S.C. § 1983, that the Transit Authority's exclusion of present and past methadone maintained persons from employment was a violation of the due process and equal protection clauses of the Fourteenth Amendment. (399 F. Supp. 1032) The Court subsequently issued an Amended Permanent Injunction and Judgment (Petition for Certiorari, Appendix E, p. 75a) in which it ordered the Authority to give individual consideration to each methadone maintained employee or applicant for employment and awarded back pay.

Thereafter, the District Court issued a supplemental opinion finding the Transit Authority guilty of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., as amended, for the sole purpose of establishing jurisdiction to award attorneys' fees. (414 F. Supp. 277) Following enactment of the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988, the District Court issued the aforesaid Amended Permanent Injunction and Judgment (Petition for Certiorari, Appendix E, p. 75a) basing its award of attorneys' fees on that Act. The attorneys' fees awarded by the District Court were in the sum of $375,000 for legal services performed up to January 24, 1977.

The United States Court of Appeals, Second Circuit (558 F.2d 97), affirmed the opinion of the court below under 42 U.S.C. § 1983, except that it reversed the dismissal as to three of the named plaintiffs, remanded the case to the District Court for determination of positions to which those plaintiffs should be reinstated and the amount of back pay due them, and deducted $50,710 from the attorneys' fees awarded. The Second Circuit found it unnecessary to reach the Title VII question because before the decree became final, Congress enacted the Civil Rights Attorneys' Fees Awards Act of 1976, thereby providing an alternative basis for the attorneys' fees award.

Summary of Argument

I.

The Transit Authority's denial of employment to former heroin addicts participating in methadone maintenance programs is not an unconstitutional denial of due process and equal protection under the Fourteenth Amendment.

The employment sought in this case is not a fundamental right, deprivation of which could be justified only by a compelling state interest. *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 313 (1976); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970). Nor is the class involved herein, former heroin addicts in methadone maintenance programs, within the suspect categories which have been enumerated by this Court (e.g. race, *Korematsu* v. *United States*, 323 U.S. 213 [1944]; alienage, *Graham* v. *Richardson*, 403 U.S. 365 [1971]; ancestry, *Oyama* v. *California*, 332 U.S. 633 [1948]; and wealth in the context of criminal proceedings, *Griffin* v. *Illinois*, 351 U.S. 12 [1956]).

Since the case at bar involves neither a suspect classification nor a fundamental right, the traditional or "restrained" standard of review should be applied under the guidelines of *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970).

The courts below evaluated the Transit Authority's employment policy in terms of incorrect standards of judicial scrutiny. In concluding that this policy was an unconstitutional denial of due process and equal protection under the Fourteenth Amendment, both the District Court (399 F. Supp. at p. 1058) and the Circuit Court (558 F.2d at p. 99) expressly relied on cases (principally *Sugarman* v. *Dougall,* 413 U.S. 634 [1973] and *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 [1974]), which had applied the strict scrutiny standard reserved for cases involving a suspect classification or a fundamental interest.

As an agency charged with the responsibility for providing safe, prompt and dependable transportation to the people of the City of New York, the Transit Authority's objective is to employ persons in all job categories who are reliable, not only in terms of safety standards, but also in terms of attendance, punctuality, and general ability to function well in the routine and challenge of daily work. The Transit Authority weighed these concerns together with consideration of the weaknesses in implementation of methadone maintenance programs by the methadone clinics, the controversy within the drug addiction field concerning the efficacy of methadone treatment, the unemployability of the majority of methadone patients, the difficulties facing the employer in attempting to evaluate the employability of methadone patients and in monitoring methadone patients after employment to determine continued employability, and the rigidity of the civil service system which re-

quires formal disciplinary proceedings in order to terminate the employment of unsatisfactory employees who have acquired tenure after a brief probationary period.

Each of the foregoing reasons was amply supported by the testimony of the various expert witnesses at the trial. However, by reason of their application of the strict scrutiny standards, the courts below erroneously emphasized the beneficial results of methadone maintenance for a minority of methadone patients, and ignored the body of evidence demonstrating the uncertainties and failures of methadone maintenance for the majority of methadone patients.

While the evidence indisputably demonstrated that the majority of methadone maintained patients are unemployable, the courts below focused their attention on the minority of such patients who are employable. They gave no weight to the substantial difficulties facing the employer in evaluating the employability of methadone maintained patients.

The record in this case demonstrates the rational basis for the Transit Authority's policy, and the absence of the invidious discrimination necessary for a finding of unconstitutionality under the traditional standard of scrutiny. *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U.S. 307 (1976); *Dandridge* v. *Williams,* 397 U.S. 471 (1970). There is no basis for the finding of unconstitutionality.

II.

The District Court ruled that the Transit Authority's policy of excluding methadone maintained persons from employment had a disparate impact on Blacks and Hispanics and therefore constituted unlawful employment dis-

crimination in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e) as amended. The ruling was made for the express and sole purpose of establishing jurisdiction for an award of attorneys' fees.

A finding of unlawful discrimination under Title VII should not be made against a government agency such as the Transit Authority merely on the basis of disparate impact without proof of discriminatory intent.

The 1972 amendment to Title VII, extending its jurisdiction to state and local government, was based on the Fourteenth Amendment. *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, 453 (1976) In *Washington* v. *Davis,* 426 U.S. 229 (1977), this Court made clear that in discrimination claims arising under the Fourteenth Amendment, proof of purposeful discrimination is required.

A statute cannot be construed more broadly than its constitutional base. To the extent that Title VII asserts jurisdiction over the employment practices of government employers, it must be construed in accordance with the Fourteenth Amendment standard for evaluating discrimination claims, i.e., there must be proof of racially discriminatory purpose. In the case at bar, the District Court acknowledged that the Transit Authority's employment policy was not adopted with a racially discriminatory purpose. Accordingly, the finding of unlawful discrimination was improper.

Even if a violation of Title VII could be established against a government agency employer on the basis of disparate impact without proof of discriminatory intent, the evidence in this case was totally inadequate to support the finding of discrimination.

The District Court found disparate impact solely on the basis of statistics purporting to show (1) that of the employees referred to the Transit Authority's medical consultant for suspected violation of its drug policy, 81% were Black and Hispanic and 19% were white; and (2) that between 62% and 65% of methadone maintained persons in New York City are Black and Hispanic.

The first set of statistics is irrelevant in the context of this case, since it did not include any methadone maintained persons, nor did it indicate how many, if any, of the persons referred to the medical consultant, were discharged from employment. In addition, the statistics were compiled on the basis of a total number of fifty-four individuals referred to the medical consultant over a period of twenty-six months. The group from which the statistics were derived was so small as to render the statistics virtually meaningless.

The second set of statistics purported to be based on a random sampling of the total methadone patient population in New York City. In fact, it covered only the patients treated at the public and semi-public methadone clinics. It did not reflect information on the patients treated at the various private clinics who make up over one-third of the total methadone patient population in New York City. In addition, although no more than 30-50% of methadone patients are employable, these statistics did not consider the employability of the sample. There were no statistics with regard to the racial or ethnic composition of that portion of the methadone patient population which could be considered employable.

The District Court refused to consider the Transit Authority's impressive work force statistics which show that 46% of the Authority's employees are Black and Hispanic,

and that these minority groups are employed throughout the Authority in all job categories. The District Court likewise refused to consider any of the evidence dealing with the obvious job-relatedness of the Authority's denial of employment to methadone patients. Instead, the Court placed its blind reliance on irrelevant and incomplete statistics. These statistics were totally inadequate to support a finding of disparate impact under Title VII. *International Brotherhood of Teamsters* v. *United States, et al.*, 431 U.S. 324 (1977); *Hazelwood School District, et al.* v. *United States*, 433 U.S. 299 (1977).

Even if a disparate impact had been shown, the finding of unlawful discrimination was unwarranted in light of the demonstrated business necessity for the Transit Authority's employment policy. The obvious job-relatedness of the policy, together with the substantial economic and administrative burden of attempting to evaluate the employability of individual methadone patients, and of maintaining continuing medical monitoring of methadone patients after employment, demonstrated the requisite business necessity. *United States* v. *State of South Carolina*, 445 F. Supp. 1094, 1115 (D.C.D. So. Car. 1977), aff'd —— U.S. ——, 98 S. Ct. 756 (1978).

No support exists in this case for liability under Title VII.

ARGUMENT

I.

The Transit Authority's denial of employment to former heroin addicts participating in methadone maintenance programs is not an unconstitutional denial of due process and equal protection under the Fourteenth Amendment.

The courts below found that the Transit Authority's denial of employment to former heroin addicts participating in methadone maintenance programs was an unconstitutional denial of due process and equal protection under the Fourteenth Amendment.* As defined by the District Court, the class represented by the named respondents consists of all those persons who have been or would in the future be subject to dismissal or rejection as to employment by the Transit Authority on the ground of present or past participation in methadone maintenance programs.

A. *The strict scrutiny standard should not be applied in this case.*

Equal protection issues are evaluated under either the traditional standard or the strict standard of judicial scrutiny.

Under the strict scrutiny standard, the governmental body must demonstrate that the classification being reviewed is based upon some compelling government inter-

* No procedural due process claim was made in this case. Respondents concede that tenured employees suspected of violation of the Transit Authority's drug rule are given a formal hearing in accordance with the requirements of State Civil Service Law, Section 75. (A pp. 93A-94A), see *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sinderman*, 408 U.S. 593 (1972).

est and is structured narrowly and with precision. The classification "is not entitled to the usual presumption of validity." *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 16 (1973).

The strict scrutiny standard is appropriate "only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class," *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U.S. 307, 312 (1976); *San Antonio School District* v. *Rodriguez, supra,* 411 U.S. at p. 16.

The fundamental rights which this Court has declared subject to strict scrutiny are constitutionally protected rights and liberties, such as rights of a uniquely private nature, *Roe* v. *Wade,* 410 U.S. 113 (1973); the right to vote, *Bullock* v. *Carter,* 405 U.S. 134 (1972); the right of interstate travel, *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); First Amendment rights, *Williams* v. *Rhodes,* 393 U.S. 23 (1968); the right to procreate, *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942).

This Court has specifically excluded governmental employment, such as that involved in the present case, from the fundamental right category, and has "expressly stated that a standard less than strict scrutiny 'has consistently been applied to state legislation restricting the availability of employment opportunities.'" *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U.S. 307, 313 (1976); *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970).

Consequently, the case at bar does not involve a fundamental right requiring application of strict scrutiny standards. Nor does the class involved herein, methadone users, constitute a suspect class within the contemplation of equal protection analysis.

The classes which have been designated as suspect, thereby warranting strict scrutiny, are those which are "saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School District* v. *Rodriguez, supra,* 411 U.S. at p. 28. See also, *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-153, fn. 4 (1938).

Suspect classifications which have been enumerated by this Court are race, *Korematsu* v. *United States,* 323 U.S. 213 (1944); alienage, *Graham* v. *Richardson,* 403 U.S. 365 (1971) (but see *Foley* v. *Connelie,* —— U.S. ——, 46 U.S. L.W. 4237 [1978]); ancestry, *Oyama* v. *California,* 332 U.S. 633 (1948); and wealth in the context of criminal proceedings, *Griffin* v. *Illinois,* 351 U.S. 12 (1956).

Certain other classifications which seem to have been accorded some intermediate level of scrutiny, apparently because they share to a considerable extent the characteristics of the suspect categories, are sex, *Frontiero* v. *Richardson,* 411 U.S. 677 (1973) and illegitimacy, *Mathews* v. *Lucas,* 427 U.S. 495 (1976).

The class involved in the instant case, methadone users, has none of the "traditional indicia of suspectness" set out by this Court in *Rodriguez, supra,* at p. 28. The members of this class have not suffered a history of purposeful discrimination by reason of methadone use or been subjected to disabilities on the basis of immutable characteristics of birth. See *Frontiero* v. *Richardson,* 411 U.S. 677, 686 (1973). Whatever psychological or sociological factors allegedly lead an individual to heroin addiction and eventually to the use of methadone, the category of methadone user is not immutable and would include only those who

had participated in the voluntary, illicit use of a controlled substance, heroin. Methadone use does not create a "discrete and insular" group, *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153, n.4 (1938) in need of the extraordinary protection of strict judicial scrutiny. There is no justification for adding this group to the suspect classifications which call for strict judicial scrutiny.

The strict scrutiny standard together with the traditional scrutiny standard discussed in subsection C, *infra,* form the "two-tier" standard of review of equal protection issues (see *Rodriguez, supra,* 411 U.S. at pp. 40-44; Justice STEWART Concurring Opinion, pp. 60-62; *Developments in the Law—Equal Protection,* 82 Harv. L. Rev. 1065 [1969]).

Several decisions of this Court have appeared to apply an additional standard of review, viz., an "irrebuttable presumption" formulation, to equal protection analysis, e.g. *Stanley* v. *Illinois,* 405 U.S. 645, 653 (1972); *Vlandis* v. *Kline,* 412 U.S. 441 (1973); *United States Department of Agriculture* v. *Murry,* 413 U.S. 508 (1973); and *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974). In these cases, the Court rejected legislative classifications which included irrebuttable presumptions of qualification. However, in *Weinberger* v. *Salfi,* 422 U.S. 749 (1975), the irrebuttable presumption decisions were explained in terms of strict scrutiny and traditional scrutiny standards. The Court characterized the decisions in *Stanley* and *LaFleur* as involving fundamental rights of family and childbearing, and the decisions in *Vlandis* and *Murry* as involving irrational classifications. *Salfi, supra,* at pp. 771-772. Accordingly, the irrebuttable presumption formulation appears to have been substantially curbed, if not entirely discarded.

Since the case at bar involves neither a suspect classification nor a fundamental right, the strict scrutiny standard should not be applied.

B. *The courts below evaluated the Transit Authority's employment policy in terms of the strict scrutiny standard.*

In concluding that the Transit Authority's denial of employment to former heroin addicts participating in methadone maintenance programs was an unconstitutional denial of due process and equal protection, both the District Court and the Second Circuit expressly relied on cases which had applied the strict scrutiny standard.

The principal cases cited by the District Court as "[d]ecisions dealing with the basic doctrines" were *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974), and *Sugarman* v. *Dougall,* 413 U.S. 634 (1973). (399 F. Supp. at p. 1057) The Second Circuit likewise declared that the finding of unconstitutionality "rests on the solid foundation of *Sugarman* v. *Dougall* . . . and our own *Crawford* v. *Cushman,* 531 F. 2d 1114 . . ." (558 F. 2d at p. 99). Each of the cited cases had applied the strict scrutiny standard.

In *Cleveland Board of Education* v. *LaFleur,* a mandatory maternity leave case, this Court ruled that "there is a right 'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child'," and that "public school maternity leave rules directly affect 'one of the basic civil rights of man' . . ." (*LaFleur, supra,* 414 U.S. at p. 640). Thus, *LaFleur* dealt with governmental interference with a fundamental right, thereby calling for strict judicial scrutiny. (See *Weinberger* v. *Salfi,* 422 U.S. 749, 771

[1975].) *Crawford* v. *Cushman,* which declared unconstitutional a requirement for the discharge from employment of pregnant Marines, was based expressly on *LaFleur.* (531 F. 2d at pp. 1124-1125)

In *Sugarman* v. *Dougall,* this Court ruled that since aliens are a suspect class (*Graham* v. *Richardson,* 403 U.S. 365 [1971]), classifications based on alienage are subject to close judicial scrutiny. The Court found that New York's broad exclusion of aliens from employment in the competitive classified civil service could not withstand this close scrutiny. *Sugarman, supra,* 413 U.S. at pp. 642-643.

Immediately following its analysis of *LaFleur* and *Sugarman,* the District Court declared that "Under the above authorities," the Transit Authority's "blanket ban" against the employment of methadone patients violated the due process and equal protection clauses of the Fourteenth Amendment (399 F. Supp. at p. 1058). It is evident that the Court believed that the constitutional requirements for individualized employment policies expressed in *LaFleur* and *Sugarman* were equally applicable to the case at bar.

The District Court's misapprehension of the constitutional standards applicable to this case distorted its entire perception and evaluation of the evidence presented at the trial.

While the evidence clearly demonstrated the unemployability of the majority of methadone patients and the magnitude of the alcohol and drug abuse problem, the Court failed to deal with these issues in terms of the total patient population of the methadone clinics. Rather, it focused its attention on statistics which were limited to the more stable patients who had been participants in methadone programs for a substantial period of time. The Court similarly

glossed over the significant difficulties facing the employer in attempting to evaluate the employability of methadone patients. (See Statement of Facts, *supra,* pp. 24-26.)

Under the influence of the strict scrutiny standard, the District Court emphasized the beneficial results of methadone maintenance for a minority of patients in methadone maintenance programs, and ignored the body of evidence demonstrating the uncertainties and failures of methadone maintenance for the majority of such patients. The District Court's analysis was adopted by the Second Circuit on the appeal.

C. *The Transit Authority's employment policy meets the test of rationality under the traditional standard of scrutiny.*

Since this case involves neither a fundamental right nor a suspect category, the traditional standard of review should be used in evaluating the challenged classification.

The traditional or "restrained" standard of review utilizes a "relatively relaxed standard" under which the classification being considered is presumed to be valid. This standard of review requires only that the classification bear some rational relationship to legitimate governmental purposes. *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U.S 307, 314 (1976); *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 40-41 (1973).

In *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970), this Court has said:

> " . . . a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical

nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas,* 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago,* 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if *any state of facts reasonably may be conceived to justify it.*' *McGowan* v. *Maryland,* 366 U.S. 420, 426." (emphasis added)

As an agency charged with the responsibility for providing safe, prompt and dependable transportation to the people of the City of New York, the Transit Authority's objective is to employ persons in all job categories who are reliable, both in terms of safety standards, and in terms of attendance, punctuality, and general ability to function well in the routine and challenge of daily work.

The evidence in this case demonstrated the weaknesses in implementation of methadone maintenance programs by the methadone clinics, the controversy within the drug addiction field concerning the efficacy of methadone treatment, the unemployability of the majority of methadone patients, the difficulties facing the employer in attempting to evaluate the employability of methadone patients, and the difficulties involved in monitoring methadone patients after employment to determine continued employability. Many of these concerns were recognized by this Court in *Marshall* v. *United States,* 414 U.S. 417 (1974), in a decision rendered at about the same time as the trial being conducted in the case at bar. In *Marshall,* the Court observed that:

"... there is no generally accepted medical view as to the efficacy of presently known therapeutic methods of treating addicts and the prospect for the successful rehabilitation of narcotics addicts thus remains shrouded in uncertainty. . . . As testimony before the Congress revealed, no evidence to date has demonstrated more than a speculative chance for the successful rehabilitation of narcotics addicts." 414 U.S. at p. 426.

These problems weighed together with the Transit Authority's responsibility for the safe, efficient and economical maintenance of a vast rapid transit system, its objective of employing persons able to meet reasonable standards of reliability, and the rigidity of the civil service system which requires formal disciplinary proceedings in order to terminate the employment of unsatisfactory employees who have acquired tenure after a brief probationary period, amply justified the Transit Authority's refusal to exempt methadone patients from its policy of barring drug users from employment.

In *Massachusetts Bd. of Education* v. *Murgia,* 427 U.S. 307, this Court reaffirmed the principle that under the traditional standard of scrutiny, perfection in establishing the classification is neither possible nor necessary. The Court found that a state statute providing for mandatory retirement of all uniformed state police officers at age 50 was not a denial of equal protection, stating:

"There is no indication that [the state statute] has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute." 427 U.S. at pp. 315-316.

While the State might not have chosen the best means to accomplish its objective of assuring physical fitness, the Constitution did not require it to determine fitness more precisely through individualized testing after age 50. *Murgia* at pp. 314, 316.

Similarly, in the present case, the fact that, *arguendo,* some methadone patients might be qualified to be Transit Authority employees in some positions would not render the Authority's general prohibition unconstitutional. The Transit Authority is not required to make individualized determinations when it "can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of [governmental] concern which they might be expected to produce." *Weinberger* v. *Salfi,* 422 U.S. 749, 785 [1975].

The fact that the Transit Authority has a program to assist certain employees with drinking problems does not require it to undertake a similar program for drug addicts. The Equal Protection Clause does not require the governmental body to "choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge* v. *Williams,* 397 U.S. 471, 486-487 (1970). It is not required to deal with "all like evils, or none." *U.S.* v. *Carolene Products Co.,* 304 U.S. 144, 151 (1938).

The "leap of faith" (see Statement of Facts, p. 19, *supra*) that would be necessary for the Transit Authority to hire methadone patients is not constitutionally mandated. While employment opportunities may be an important aspect in the rehabilitation of drug addicts, there is no constitutional imperative requiring the Transit Authority to participate in that rehabilitation effort. As this Court observed in *Murgia, supra,* 427 U.S. at pp. 316-317:

> "We do not make light of the substantial economic and psychological effects premature and compulsory retirement can have on an individual; nor do we denigrate the ability of elderly citizens to continue to contribute to society. The problems of retirement have been well documented and are beyond serious dispute. But '[W]e do not decide today that the [Massachusetts statute] is wise, that it best fulfills the relevant social and economic objectives that [Massachusetts] might ideally espouse, or that a more just and humane system could not be devised'. . . We decide only that the system enacted by the Massachusetts Legislature does not deny appellee equal protection of the laws."

There does not exist in this case the "invidious discrimination" necessary to a finding of unconstitutionality under the traditional standard of scrutiny. *Dandridge* v. *Williams,* 397 U.S. 471, 483 (1970).

II.

The Transit Authority's denial of employment to former heroin addicts participating in methadone maintenance programs is not an unlawful racial discrimination under Title VII of the Civil Rights Act of 1964 as amended.

In a supplemental decision, the District Court found the Transit Authority guilty of unlawful discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., as amended. (414 F. Supp. 277) This decision was made for the express and sole purpose of establishing jurisdiction for an award of attorneys' fees. (414 F. Supp. at p. 278)*

---

* The Second Circuit (558 F.2d at pp. 99-100) found it unnecessary to reach this question because before the decree became final, Congress enacted the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988, thereby providing an alternative basis for the attorneys' fees award.

A. *The District Court erred in finding the Transit Authority guilty of unlawful discrimination under Title VII in the absence of proof of discriminatory intent.*

The District Court ruled that the Transit Authority's policy of excluding methadone maintained persons from employment had a disparate impact on Blacks and Hispanics and therefore constituted unlawful employment discrimination under Title VII. The Court conceded the policy was "not adopted with a purpose of racial discrimination." (414 F. Supp. at p. 279)

This Court's decision in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), which established the principle that proof of a racially disproportionate impact is sufficient to establish a violation of Title VII, was decided in 1971, at which time Title VII covered only private employment.

The original enactment of Title VII in 1964, which prohibited discrimination because of race, color, religion, sex and national origin in private employment was based on the Commerce Clause, Article 1, Section 8 of the Constitution. (1964 U.S. Code Cong. & Ad. News [88th Congress, Second Session] 2401, 2402, 2475)

In 1972, Title VII was amended to extend its coverage to state and local government employment. (Pub. L. 92-261, Mar. 24, 1972, 86 Stat. 103) The 1972 amendment was based on the Fourteenth Amendment. *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, 453, and fn. 9 (1976). Coverage of state and local government employment could not be based on the Commerce Clause. See *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), in which this Court declared that Congress had exceeded its powers under the Commerce Clause in enacting a statute which sought to regulate employment decisions of state and local governments. The decision pro-

hibited such regulation not only as to the States themselves but as to "such subordinate arms of a state government" as provide "integral governmental services." 426 U.S. at p. 855, fn. 20.

Since Title VII jurisdiction over state and local government employers is based on the Fourteenth Amendment, in evaluating Title VII complaints against such employers, it is necessary to look to the Fourteenth Amendment standard for adjudicating discrimination claims.

Washington v. *Davis,* 426 U.S. 229 (1977), made clear that in discrimination claims arising under the Fourteenth Amendment, proof of purposeful discrimination is required. The Court stated:

> "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.
>
> The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. . . . But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." 426 U.S. at p. 239.

A statute cannot be construed more broadly than its constitutional base. To the extent that Title VII asserts jurisdiction over the employment practices of government employers, it must be construed in accordance with the constitutional test enunciated in *Washington* v. *Davis,* i.e., there must be proof of discriminatory purpose. See *Blake* v. *City of Los Angeles,* 435 F. Supp. 55 (DCD Cal. 1977); *Scott* v. *City of Anniston,* 430 F. Supp. 508 (N.D. Ala. 1977); *Friend* v. *Leidinger,* 446 F. Supp. 361, 386 (E.D. Va. Richmond Division 1977).

Since the Transit Authority's employment policy was not adopted with a racially discriminatory purpose, the finding of unlawful discrimination was improper.

B. *The evidence in this case was insufficient to prove a disparate impact in violation of Title VII.*

Even if a violation of Title VII could be established against a government agency employer solely on the basis of disparate impact, the evidence in this case was totally inadequate to support the finding of discrimination.

In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) this Court stated that Title VII required:

> "... the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 U.S. at p. 431.

In order to establish a prima facie case of disparate impact, the plaintiff must show that a facially neutral employment standard has a disproportionate impact on an affected group. While statistics are a recognized means of establishing a prima facie case of disparate impact, this Court has made clear in *International Brotherhood of Teamsters* v. *United States, et al.*, 431 U.S. 324, 340 (1977) that:

> "... [S]tatistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all the surrounding facts and circumstances. See e.g. *Hester* v. *Southern R. Co.*, 497 F. 2d 1374, 1379-1381 (CA5)."

See also, concurring opinion of Justice REHNQUIST, in *Dothard* v. *Rawlinson*, 433 U.S. 321, 338 (1977).

The effectiveness of the statistics used by a plaintiff will depend on the size of the statistical sample (*International Brotherhood of Teamsters* v. *United States, et al., supra*, 431 U.S. at pp. 339-340 fn. 20; *Robinson* v. *City of Dallas*, 514 F. 2d 1271, 1273 [5th Cir. 1975]; *Morita* v. *Southern California Permanente Medical Group*, 541 F. 2d 217, 220 [9th Cir. 1976], *cert. den.*, 429 U.S. 1050 [1977]); the relevancy of the statistics (*Taylor* v. *Safeway Stores, Inc.*, 527 F. 2d 263, 272 [10th Cir. 1975]; *Kirkland* v. *State Department of Correctional Services*, 520 F. 2d 420, 428 [2d Cir. 1975]); and the applicable labor market (*Hazelwood School District, et al.* v. *United States*, 433 U.S. 299, 308, fn. 13 [1977]).

In the instant case, the District Court conceded that the employment policy in question was "not adopted with a purpose of racial discrimination," (414 F. Supp. at 279) and based its decision entirely on two sets of statistics.

The first set of statistics was that "of the TA employees referred to the TA's medical consultant for suspected violation of its drug policy since July 1972, 81% were Black and Hispanic and only 19% were white." (414 F. Supp. at p. 278) This information was derived from a letter to respondents' counsel from Dr. Harold L. Trigg, Chief of the Methadone Maintenance and Drug Addiction Services at Beth Israel Medical Center, who also serves as medical consultant to the Transit Authority.*

The Trigg letter stated that for the period from July 19, 1972 through October 1, 1974, the racial and ethnic breakdown of individuals referred to him by the Transit Au-

---

* The Trigg letter was stipulated into the record (See R. Tr. 10/22/74, p. 176) and appears in the Circuit Court Appendix at p. 587.

thority was as follows: 39 Blacks, 5 Hispanics and 10 whites.

It was stipulated by the parties during the trial that:

> "TA employees showing physical manifestations of drug abuse *other than the definite presence of morphine or methadone or other illicit drug in the urine,* are referred for consultation to Dr. Harold Trigg of Beth Israel Medical Center, who reports his impression to the TA whether the individual is abusing or has abused drugs. The TA accepts Dr. Trigg's impression of the case." (A. p. 86A, emphasis supplied)

Since the people referred to Dr. Trigg by the Transit Authority specifically did not include those whose urine showed the presence of methadone, no methadone maintenance patients would have been included in the group from which the District Court derived its 81% minority figure. Moreover, there is no evidence as to what diagnosis Dr. Trigg made with respect to any of the individuals in the group, nor is there any evidence as to how many, if any, of these individuals were discharged from employment. Thus, this set of statistics is totally irrelevant to the question of whether the Transit Authority's exclusion of methadone maintained persons from employment had a disparate impact on employment opportunities for Blacks and Hispanics.

Furthermore, the entire group involved in this set of statistics consisted of fifty-four people who were referred to Dr. Trigg over a twenty-six month period. The size of the sample is so small as to be meaningless in light of the Transit Authority's total work force of over 40,000 employees. *International Brotherhood of Teamsters v. United States, et al.,* 431 U.S. 324, fn. 20 (1977).

The second set of statistics relied on by the District Court was that "Between 62% and 65% of methadone maintained persons in New York City are Black and Hispanic, meaning that there are almost twice as many Blacks and Hispanics as there are whites in this category." (414 F. Supp. at p. 279) This set of statistics is derived from a letter to respondents' counsel from Peter L. Vogelson, Coordinator of Field Service for the Methadone Information Center of Rockefeller University. (Pl. Ex. 21, R. Tr. 10/22/74, pp. 176-177, Circuit Court Appendix p. 588)

The Vogelson letter stated that the racial/ethnic breakdown of the methadone patient population for Metropolitan New York City was as follows: Black, 38.5% White, 33.14%, Puerto Rican, 22.5%, and Undefined, 5.85%. Thus, the percentage of Blacks was slightly higher than the percentage of Whites, and the percentages of Whites was substantially higher than the percentage of Puerto Ricans.

The Vogelson letter stated that the cited percentages were based on a random sample of 1400 patients and reflected the "total population" of methadone maintenance patients in Metropolitan New York City. However, the Rockefeller University Methadone Information Center does not receive information from the private methadone clinics and consequently, does not have information on the approximately 14,000 patients treated at the various private clinics. (R. Tr. 1/7/75, Dole, 113-116; 1/9/75, Lukoff, 251-252, 399 F. Supp. at p. 1040) Therefore these statistics did not reflect information on more than one-third of the total methadone patient population in New York City.

Moreover, the Vogelson statistics did not consider the employability of the sample. As shown in the Statement of Facts, *supra,* at pp. 18-21, no more than 30-50% of methadone patients are employable.

In order to establish a prima facie case with statistical data, the statistics must be closely related to the specific issues involved in the case. *Taylor* v. *Safeway Stores, Inc.*, 524 F.2d 263, 272 (10th Cir. 1975); *Kirkland* v. *State Department of Correctional Services*, 520 F.2d 420, 428 (2d Cir. 1975). Obviously, the employability of the sample is an essential element of the statistics used to make the prima facie case. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977); *International Brotherhood of Teamsters* v. *United States, et al.*, 431 U.S. 324, fn. 20 (1977).

The Vogelson statistics, in addition to being based on an incomplete sampling, contained no racial or ethnic information with regard to employable methadone patients. Consequently, these statistics, like the Trigg statistics, *supra*, have no bearing on whether the Transit Authority's employment policy had a disparate impact on the employment opportunities for Blacks and Hispanics, and are totally inadequate to establish a prima facie case.

Despite the glaring defects of the two sets of statistics discussed above, the District Court placed its total reliance on those statistics, and expressly refused to consider what it conceded to be a "liberal amount" of employment of minorities by the Transit Authority. (414 F. Supp. at p. 279)

The Transit Authority's EEO-4 form for 1974* shows that 46% of the Authority's work force is Black and Hispanic, and that these minority groups are employed

* In late 1973, pursuant to the regulations of the Equal Employment Opportunity Commission (29 C.F.R. § 1602.30), the Transit Authority began, for the first time, to maintain records of the racial and ethnic identity of its employees. The Authority has never maintained records of the racial and the ethnic identity of individual applicants for employment. Such records are not required by the EEOC and are prohibited by State law (New York Executive Law § 296.1(d)).

throughout the Authority in all job categories, including officials and administrators, professionals, technicians, clericals, skilled crafts and service and maintenance employees. (Def. Ex. P, R. Tr. 2/12/75, p. 1476, appearing in the Circuit Court Appendix at pp. 2985-2997) These statistics are particularly impressive when placed against the background of statistics from the United States Department of Commerce, Bureau of the Census, which indicate that the civilian work force for the New York Standard Metropolitan Statistical Area for 1970 was approximately 15.0% Black and 5.1% Hispanic. (A., p. 104A)

Yet, the District Court refused to consider either the Transit Authority's work force statistics or any of the evidence dealing with the obvious job-relatedness of the Authority's refusal to employ methadone patients. The Court thus fell prey to the blind reliance on statistics against which this Court cautioned in *International Brotherhood of Teamsters* v. *United States, et al.*, 431 U.S. 324, 340 (1977).

Since the respondents failed to prove disparate impact, it was not incumbent on the Transit Authority to show that its policy was a business necessity. Nevertheless, the Authority was able to demonstrate business necessity. A determination of whether the employment policy in question is a business necessity includes consideration of the alternative practices available to the employer. "In examining alternatives, the risk and cost to the employer are relevant." *United States* v. *State of South Carolina*, 445 F. Supp. 1094, 1115 (D.C. D. So. Car. 1977), aff'd —— U.S. ——, 98 S. Ct. 756 (1978).

The only alternative available to the Transit Authority would be individualized consideration of each methadone patient who applies for employment. This approach would require the Authority either to place a heavy reliance on the recommendations of the employees of the methadone clinics or to hire a panel of medical consultants to evaluate methadone applicants. In addition, after hiring the methadone patient, the Authority would have to maintain an ongoing surveillance of the employee, including frequent urinalysis to detect drug abuse. An additional problem in this process of individualized evaluation is the federal regulation declaring records of methadone clinics to be confidential, thereby imposing on the employer the burden of employing methadone patients on the basis of conclusory statements by clinic personnel without specific supportive data.

The obvious job-relatedness of the Transit Authority's policy, particularly in the context of a large and sprawling transit system, together with the substantial economic and administrative burden of attempting to evaluate the employability of individual methadone patients, and of maintaining continuing medical monitoring of methadone patients after employment, demonstrated the requisite business necessity.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgments of the Courts below should be reversed and the complaint should be dismissed.

Respectfully submitted,

ALPHONSE E. D'AMBROSE
Attorney for Petitioners
New York City Transit Authority, et al.
370 Jay Street
Brooklyn, New York 11201

HELEN R. CASSIDY
JOAN OFFNER
EUGENE FREIDUS
of Counsel

September 5, 1978